APPENDIX 1

IN THE COURT OF CLAIMS OF THE UNITED STATES

No. 43813

(Decided January 8, 1945)

JOSEPH A. HOLPUCH COMPANY v. THE UNITED STATES

Mr. Norman B. Frost for the plaintiff. *Mr. George M. Weichelt* was on the briefs.

Mr. William A. Stern, II, with whom was *Mr. Assistant Attorney General Francis H. Shea*, for the defendant.

This case having been heard by the Court of Claims, the court, upon the evidence and the report of a commissioner, makes the following

Special Findings of Fact

1. Joseph A. Holpuch Company, named as plaintiff herein, was chartered as a corporation of the State of Illinois, January 17, 1913, to engage in the general building construction business.

On June 8, 1931, the Superior Court of the County of Cook, State of Illinois, by decree of that date declared the corporation dissolved and its charter and authority null and void for failure to file statutory reports and pay franchise taxes.

On February 29, 1936, the same court entered the following decree.

> This cause coming on this day to be heard upon the stipulation this day filed in the above-entitled cause by the above-entitled parties, and the Court being fully advised in the premises, finds, that Joseph A. Holpuch Company has filed all necessary annual reports due up to the present time, and that it has paid all franchise taxes and penalties thereon.
>
> Therefore, it is ordered, adjudged, and decreed that the decree entered in the above-styled cause on the 8th

day of June, 1931, dissolving the said defendant corporation, be and the same is hereby vacated, set aside and held for naught.

* * * * * * *

2. On December 30, 1931, the plaintiff entered into a contract, No. VAc 110, with the defendant, represented by L. H. Tripp, Director of Construction, Veterans' Administration, as contracting officer, whereby, for the consideration of $788,600.00, the plaintiff agreed to furnish all labor and materials and perform all work required for constructing and finishing complete at the Veterans' Administration Home, Leavenworth, Kansas, a Hospital Building and tunnel and Nurses' Quarters, including roads, retaining wall, walks, grading and drainage in connection with these buildings, and removing and relocating the existing Governor's residence and Quartermaster's residence, providing the roads, walks, grading and drainage in connection with the two relocated buildings, but not including plumbing, heating, electrical work, outside service connections, electric elevators and refrigeration plant in connection with the Hospital Building and Nurses' Quarters, all according to designated specifications, schedules and drawings made a part of the contract.

By the contract it was agreed the work was to be commenced within 15 calendar days after date of receipt of notice to proceed, and was to be completed within 300 calendar days thereafter.

Notice to proceed was received by the plaintiff January 18, 1932. The work accordingly was to be commenced by February 2, 1932, and was to be completed by November 13, 1932.

3. The plaintiff began work on the contract within the agreed time. On April 1, 1932, the contracting officer terminated plaintiff's right to proceed with the work on the ground that it was not proceeding with sufficient diligence to insure completion within the agreed time.

Article 9 of the contract provided in part as follows:

> Article 9. *Delays—Damages.*—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its com-

pletion within the time specified in Article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. * * *

4. The plaintiff endeavored to get the order of termination vacated and its contract reinstated. For that purpose its representative, together with a representative of plaintiff's surety on its performance bond, Standard Accident Insurance Company, visited the contracting officer in Washington, D. C., and presented plaintiff's request to that officer. The contracting officer refused to set aside the order of termination.

In view of the fact that a large proportion of the work had already been let by the plaintiff to subcontractors, and that the cancellation of the subcontracts would probably result in delays, litigation and increased cost of performance, it was arranged among the interested parties that the surety should undertake performance of the remaining work under the terms of the original contract, that the surety should sublet such work to the plaintiff thus keeping the subcontract structure more or less intact, that the contract price should be paid by the surety to the plaintiff, and that the management of the work should be taken away from John V. Hawkins and placed in the hands of Mads Madsen, who operated under the name of Mads Madsen & Company, and who was plaintiff's subcontractor on concrete and cement work.

By contract between Standard Accident Insurance Co., plaintiff's surety, and the plaintiff, April 25, 1932, the plaintiff agreed, as the surety company's subcontractor, to perform all the work originally agreed to be performed, including changes, past and future, but not including work already performed, all at the original contract price as amended by defendant's changes, the Holpuch Company to receive direct a proportionate amount for the work already done.

The management of the work was placed in the hands of Mads Madsen by contract to that effect between plaintiff and Mads Madsen April 12, 1932.

No formal contract, other than the original contract with the plaintiff and the bond of the surety for performance, was signed by the contracting officer.

The defendant has paid directly to the plaintiff, for work performed by the plaintiff before termination of its contract, the sum of $5,130.00 as part of the contract price.

5. Article 15 of the contract reads as follows:

> *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such questions of fact. In the meantime the contractor shall diligently proceed with the work as directed.

No written appeal to the head of the department was taken by plaintiff from the finding of the contracting officer that the plaintiff was not proceeding with such diligence as to insure completion by the completion date.

6. No findings are made as to whether or not plaintiff was proceeding with the necessary diligence, nor on any damages that may have been suffered by plaintiff on account of the termination of the contract.

Conclusion of Law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff is not entitled to recover and its petition is therefore dismissed.

Judgment is rendered against plaintiff for the cost of printing the record herein, the amount thereof to be entered by the clerk and collected by him according to law.

Opinion

WHITAKER, Judge, delivered the opinion of the court:

On December 30, 1931, an association known as the Joseph A. Holpuch Company entered into a contract with defendant to construct a hospital building and nurses' quarters at the Veterans' Administration Home at Leavenworth, Kansas. The work was to be commenced within 15 calendar days after receipt of notice to proceed and was to be completed within 300 calendar days thereafter. Notice to proceed was received by plaintiff on January 18, 1932, fixing the date for commencing the work as February 2, 1932, and the date of completion as November 13, 1932.

On April 1, 1932, the contracting officer terminated plaintiff's right to proceed on the ground that it was not proceeding with sufficient diligence to insure completion within the agreed time. Plaintiff contends that this action was arbitrary, capricious, and unreasonable and, therefore, a breach of the contract. It sues for damages resulting therefrom.

The first defense raised by the defendant is that at the time the contract was entered into Joseph A. Holpuch Company, plaintiff, was not a corporation as it held itself out to be, and that it was not a corporation when this suit was brought on January 12, 1938.

On the trial of the case before the Commissioner the defendant introduced an order of the Superior Court of Illinois, dated June 8, 1931, dissolving the plaintiff company for failure to pay its franchise taxes. Defendant's counsel stated that this order was introduced for the sole purpose of reflecting on the credibility of the witness then under examination, Joseph A. Holpuch; but defendant now seeks to use it in support of its defense that plaintiff was not a corporation either at the time the contract was signed or at the time this suit was brought. Since plaintiff had no notice until after the closing of the testimony that defendant

intended to use the decree of dissolution in support of its defense of *nul tiel* corporation, on plaintiff's motion we permitted it to file at the argument of this case a certified copy of a later decree of the Superior Court of Illinois, dated February 29, 1936, vacating the former decree of dissolution.

This latter decree recited that it appearing—

> * * * that Joseph A. Holpuch Company has filed all necessary annual reports due up to the present time, and that it has paid all franchise taxes and penalties thereon.
>
> Therefore, it is ordered, adjudged and decreed that the decree entered in the above-entitled cause on the 8th day of June 1931, dissolving the said defendant corporation, be and the same is hereby vacated, set aside and held for naught.

* * * * * * *

The corporation that had been previously dissolved was by this decree reinstated and reclothed with all its former powers as though the original decree of dissolution had never been entered. By its terms the dissolution decree was set aside and held for naught. The court's right to take this action is not questioned, *Ruthfield* v. *Louisville Fuel Company*, 312 Ill. App. 415, 38 N. E. 2d, 832, and so from this date on the situation was as if the dissolution decree had never been entered. The plaintiff, therefore, at the time this suit was brought had capacity to sue.

Whether or not it can maintain an action on a contract entered into between the date of the dissolution decree and of the decree setting it aside is not so clear. Except for the decree setting aside the decree of dissolution, we think the corporation could not have maintained an action on, or one for the breach of a contract entered into after its dissolution. *Bates Co.* v. *United States*, 77 C. Cls. 611, 618, 3 F. Supp. 245; *Zahn Co., et al.* v. *United States*, 79 C. Cls. 215, 220, 6 F. Supp. 317; *Chicago Title & Trust Co.* v. *Wilcox Building Corp.*, 302 U. S. 120, and cases there cited; *Berg Shipbuilding Co. et al.* v. *United States*, No.

45256, this day decided. The authorities are in conflict over whether it can do so after entry of a decree vacating the decree of disolution. The Court of Civil Appeals of Texas held in *Lyons* v. *Texorado Oil and Gas Company*, 91 S. W. (2d) 375, that after reinstatement a corporation could maintain an action on a contract entered into in the interim; and the Supreme Court of Oregon in *Gillen-Cole Co.* v. *Fox & Co.*, 146 Ore. 208, 29 P. (2d) 1019, held the same thing, where the contracts had been ratified after reinstatement. To the contrary is the opinion of the Supreme Court of California in *Ransome-Crummey Co.* v. *Superior Court*, 188 Calif. 393, 205 P. 446. Cf. *McClung et al.* v. *Hill et al.*, 96 F. (2d) 236.

However, under the facts disclosed in the case at bar, we are of opinion that the decree vacating the dissolution decree was intended to put the plaintiff corporation in the same situation as it would have been in had it paid its franchise taxes when due. This is because the decree vacating and setting aside and holding for naught the former decree was predicated on the fact that the taxes in default had been paid and that penalties had been paid for failure to pay them when due. Had the taxes been paid when due, there would have been no basis for the entry of the dissolution decree. Their subsequent payment, together with the payment of penalties for non-payment when due, removed the reason for the dissolution and put the corporation in the same situation it would have been in had the taxes been paid when due. At any rate, we think this was what the court intended to accomplish when it entered the decree dissolving the dissolution decree.

It would be inequitable for the State to collect taxes levied on the privilege of doing business as a corporation and at the same time deny to the corporation the right to exercise the privilege. So when it accepted payment of taxes in default, together with penalties, and set aside the dissolution decree, we think it intended to validate the exercise of the corporate franchise in the years for which the taxes were paid.

Contracts entered into without the payment of license taxes are void only because the laws of the State imposing

the taxes make them void, either expressly or by implication. We will not assume that the State of Illinois intended to accept taxes on the exercise of the corporate franchise and at the same time make the corporation's contracts illegal because it was not authorized to exercise the franchise.

If the effect of the decree setting aside the dissolution decree is what we have supposed, the defendant here cannot complain; its rights were in nowise prejudiced thereby. Only the State levying the taxes is interested in the nonenforcement of contracts entered into without prior payment of them. The other contracting party is not injured thereby. If defendant has breached its contract with plaintiff, certainly it should not escape liability therefor because the corporation did not pay its taxes when due, where the State, in consideration of the payment of penalties, has forgiven the corporation therefor.

We think it was the purpose of this decree vacating the dissolution decree to give validity to all acts done in the meantime and, hence, we conclude that plaintiff can maintain an action for the breach of a contract entered into between the dates of the two decrees.

The defendant also raises the defense that plaintiff cannot recover, whatever the merits, because it failed to pursue the procedure laid down by the contract for the adjustment of the dispute which arose between it and the contracting officer as to whether or not it was prosecuting the work with such diligence as would insure completion of the contract within the time required. We think this defense is good.

Article 9 of the contract provides in part:

> If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in article 1, or any extention thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. * * *

On April 1, 1932, the contracting officer wrote plaintiff in part as follows:

> This will confirm telegram of this date reading as follows:
>
> "Since you have failed to so prosecute the work under your contract dated December thirtieth nineteen hundred thirty-one for construction work Veterans Administration Home Leavenwoth Kansas with such diligence as to insure its completion by the time stipulated therein you are notified that your right to proceed with the work is hereby terminated Stop This is done in accordance with article nine of the contract" * * *.

Thus the contracting officer found that the plaintiff was not prosecuting the work under its contract with such diligence as to insure its completion by the stipulated date. This is final under article 15 of the contract, in the absence of appeal. This article provides:

> * * * all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such questions of fact. * * *

Whether or not the plaintiff was proceeding with the requisite diligence was clearly a question of fact, made conclusive upon the parties, subject only to appeal to the head of the department.

When the plaintiff received the letter of the contracting officer it did not file a written appeal to the head of the department. Instead, its representative, together with the representative of its surety on its performance bond, Standard Accident Insurance Company, came to Washington to see the contracting officer in an effort to get him to set aside his order terminating plaintiff's right to proceed. The contracting officer refused to do so. No written appeal was then taken to the head of the department. Instead, an arrangement was worked out between the Veterans' Administration

and the surety company, whereby the surety agreed to take over performance of the remaining work under the contract and to sublet it to plaintiff, with the understanding that plaintiff's former general superintendent, John V. Hawkins, should be replaced by a man by the name of Madsen. Pursuant to this understanding, the surety company and plaintiff entered into a contract on April 25, 1932, under the terms of which the plaintiff agreed, as the surety company's subcontractor, to perform all the remaining work under the contract, with the understanding that the defendant should make payments due thereunder to the surety, and that the surety in turn would transmit said payments to plaintiff. The contract was completed under this arrangement.

It, therefore, appears that instead of appealing from the finding of fact by the contracting officer, on the basis of which he terminated the conract, plaintiff acquiesced therein and entered into a substitute arrangement for the further performance of the contract.

Plaintiff, therefore, is bound by the contracting officer's finding that it was not pursuing the contract with such diligence as would insure its completion on time. This fact justified the contracting officer in terminating the contract.

Plaintiff, therefore, is not entitled to recover whatever damages may have been suffered thereby.

The commissioner finds that the plaintiff has been paid the sum of $5,130.00 for work done under the contract prior to its termination. Plaintiff takes no exception thereto and does not now contend that any more is due for work done prior to the termination of the contract.

Since it is clear that plaintiff is not entitled to recover, for the reasons stated, we do not consider whether or not the contracting officer was in fact justified in terminating the contract, nor whether plaintiff was damaged thereby.

Plaintiff's petition will be dismissed. It is so ordered.

MADDEN, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice,* concur.

JONES, *Judge,* took no part in the decision of this case.

A true copy.

Test:

—— ——, Clerk, Court of Claims of the United States.

APPENDIX 2

IN THE COURT OF CLAIMS OF THE UNITED STATES

No. 43808

(Decided January 8, 1945)

STANDARD ACCIDENT INSURANCE COMPANY
v.
UNITED STATES

Mr. Norman B. Frost for plaintiff. *Mr. George M. Weichelt* was on the brief.

Mr. William A. Stern, II, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

This case having been heard by the Court of Claims, the court, upon the evidence and the report of a commissioner, makes the following:

Special Findings of Fact

1. The plaintiff, Standard Accident Insurance Company, is a corporation organized and existing under the laws of the State of Michigan.

2. On January 8, 1932, the plaintiff obligated itself by bond as surety for the performance by Joseph A. Holpuch Company of the terms of a contract between the Joseph A. Holpuch Co. and the United States, No. VAc 110, entered into December 30, 1931, the United States being represented by L. H. Tripp, Director of Construction, Veterans' Administration, as contracting officer, whereby, for the consideration of $788,600.00, the Holpuch Company agreed to furnish all labor and materials and perform all work required for constructing and finishing complete at the Veterans' Administration Home, Leavenworth, Kansas, a Hospital Building and tunnel and Nurses' Quarters, including roads, retaining wall, walks, grading and drainage in connection with these buildings, and removing and relocating the existing Governor's residence and Quartermaster's residence, providing the roads, walks, grading and drainage in con-

nection with the two relocated buildings, but not including plumbing, heating, electrical work, outside service connections, electric elevators and refrigeration plant in connection with the Hospital Building and Nurses' Quarters, all according to designated specifications, schedules and drawings made a part of the contract.

The work was by the contract agreed to be commenced within 15 calender days after date of receipt of notice to proceed and was to be completed within 300 calendar days thereafter.

Notice to proceed was received by the Holpuch Company January 18, 1932. The work accordingly was to be commenced by February 2, 1932, and was to be completed by November 13, 1932.

3. Articles 3, 5, 6, 9 and 15 of the contract read in part as follows:

> ARTICLE 3. *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties can not agree upon the adjustment the dispute shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.
>
> ARTICLE 5. *Extras.*—Except as otherwise herein provided, no charge for any extra work or material will be

allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.

ARTICLE 6. * * * The Government shall have the right to reject defective material and workmanship or require its correction. Rejected workmanship shall be satisfactorily corrected and rejected material shall be satisfactorily replaced with proper material without charge therefor, and the contractor shall promptly segregate and remove the same from the premises.

ARTICLE 9. *Delays—Damages.*—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in Article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such material, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: *Provided*, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforesee-

able causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes: *Provided further*, That the contractor shall within ten days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay, and his findings of facts thereon shall be final and conclusive on the parties hereto, subject only to appeal, within thirty days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay shall be final and conclusive on the parties hereto.

ARTICLE 15. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such questions of fact. In the meantime the contractor shall diligently proceed with the work as directed.

4. The Holpuch Company began work on the contract within the agreed time. On April 1, 1932, the contracting officer terminated the Holpuch Company's right to proceed with the work, on the ground that it was not proceeding with sufficient diligence to insure completion within the agreed time.

5. The Holpuch Company endeavored to get the order of termination vacated and its contract reinstated. For that purpose its representative, together with a representative of the plaintiff, visited the contracting officer in Washington, D. C., and presented the Holpuch Company's request to that officer. The contracting officer refused to set aside the order of termination.

A large proportion of the work had already been let by the Holpuch Company to subcontractors. In view of that fact, and that the cancellation of the subcontracts would probably result in delays, litigation and increased cost of performance, it was arranged among the interested parties that the plaintiff should undertake performance of the remaining work under the terms of the original contract, that the plaintiff should sublet such work to the Holpuch Company, thus keeping the subcontract structure more or less intact, that the contract price should be paid by the surety (plaintiff) to the Holpuch Company, and that the management of the work should be placed in the hands of Mads Madsen, who operated under the name of Mads Madsen & Company, and who was Holpuch Company's subcontractor on concrete and cement work.

By contract between the plaintiff and the Holpuch Company dated April 25, 1932, the Holpuch Company agreed, as plaintiff's subcontractor, to perform all the work originally agreed to be performed, including changes, past and future, but not including work already performed, all at the original contract price as amended by defendant's changes, the Holpuch Company to receive directly a proportionate amount for the work already done.

The management of the work was placed in the hands of Mads Madsen by contract to that effect between the Holpuch Company and Mads Madsen April 12, 1932.

No formal contract, other than the original contract with the Holpuch Company and the bond of the plaintiff for performance, was signed by the contracting officer.

6. The plaintiff proceeded with the work the latter part of April 1932, under the arrangement thus made, and it was substantially completed June 30, 1933, being 229 days beyond the original contract time.

Thereafter the plaintiff was paid the full contract price, including prices on change orders, and plaintiff turned such receipts over to the Holpuch Company, except that the sum of $5,130, part of the contract price, was paid by the defendant directly to the Holpuch Company for work done prior to termination of its contract as heretofore related.

7. *Barrel bolts on window screens*, $387.20. Barrel bolts on the window screens were supplied by the plaintiff according to samples submitted and accepted. Their installation as shown on the contract drawings placed them in an inoperative position. The plaintiff's and defendant's superintendents and the contractor having their installation conferred on the difficulty and decided to place the bolts in a different position.

The bolts were for the purpose of preventing the screens from warping outwardly in the center.

They were installed as agreed, but with a certain lack of uniformity. On final inspection by the Government's officers, some of the installations were objected to and the plaintiff was required to change them to conform to the ideas of defendant's superintendent of construction, and the plaintiff made the change.

The reinstallation required made a more workmanlike job.

The cost to the plaintiff of the change amounted to $387.20 including overhead and profit.

Claim therefor, in the sum of $387.20, was made by plaintiff to the Comptroller General November 16, 1934, and it has not been paid.

8. *Changes in installation of marble*, $173.03. The plaintiff waives this item of its claim.

9. *Access panels*, $535.43. Section 18 C 6 (a) of the contract specifications provided that: "Where shown or directed in hollow tile partitions or in ceiling or wall furring for access to concealed traps, valves, machinery, etc., there shall be provided doors of No. 16 U. S. Standard gauge sheet steel." This provision was under the heading "Standard Specification for Fire Resisting Doors, etc."

The plans showed the location of numerous access panels. Such panels are designed to give access to concealed traps, valves, pipes, machinery, electrical work, etc.

The plaintiff installed 61 more access panels than were shown on the plans.

While the plaintiff was installing access panels shown by the plans, defendant's superintendent of construction examined the situation and ruled that plaintiff must install

these additional access panels under the drinking fountains and other places of installation not shown by the plans. The plaintiff proceeded to do so and installed 61 of them. Defendant's construction superintendent submitted his ruling to the Veteran's Administration in Washington, D. C., which ruled that they were not to be installed. Their installation has not been paid for. The cost thereof, including profit and overhead, was $535.43.

Following correspondence on the subject the plaintiff's general superintendent, Mads Madsen, made claim September 30, 1933, addressed to the Director of Construction, Veterans' Administration, for this amount.

Prior thereto, beginning the early part of February 1933, the plaintiff, in correspondence with the contracting officer through his local superintendent of construction, had asserted claims for the cost of the additional access panels. The accepted practice in force was for plaintiff's representative to communicate with the contracting officer by routing his letters thereto through the local superintendent of construction.

10. *Membrane waterproofing,* $332.75. Article 5 (a) of section 14 C of the specifications is as follows: "Where promenade tile roofs are required, the membrane waterproofing shall cover the entire area below the concrete and tile topping, except as otherwise specified under 'Roofing'."

There were two corridors connecting buildings under construction which were open to the weather at the sides. Contract drawing No. 202 showed that the floors of these exposed corridors were to be provided with membrane waterproofing.

A dispute arose between the parties as to whether the contract required this membrane to be laid in the exposed corridors. The contracting officer ruled that it was to be laid and it was laid.

Article No. 2 of the contract provided that: "Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications shall be of like effect as if shown or mentioned in both."

The plaintiff did the work under protest, submitted a bill to the Veterans' Administration December 27, 1932, for the actual cost, plus profit and overhead, a total of $332.75, and it has not been paid.

11. *Wood terrazzo grounds*, $3,993.00. The specifications, section 12 CC (6), with reference to terrazzo base, provided: "Base shall be run plumb, level, true and straight with neatly formed cove and rounded top. When sufficiently hardened, rub surface with an electric base rubbing machine or by hand in places where machine cannot reach, using a coarse abrasive for first rubbing after which a coating of neat portland cement of approved color shall be applied, well rubbed into surface holes, interstices and voids. The finishing of base, borders and thresholds shall consist of polishing all plain and curved surfaces with a fine stone to level, plumb, true and smooth finish."

Section 22 C (11) of the specifications provided: "Where required, terazzo base as provided under 'Terrazzo' (Section 12 CC) shall be installed before plastering. Plastering shall always begin at top of base or bottom of partition in order to insure a straight, true wall."

In order to run plumb, level, true and in a straight line the terrazzo base required temporary wood grounds, which acted as a guide for the mold when the terrazzo base was being laid. After the terrazzo base had been constructed, the temporary grounds were removed and scrapped and the plastering begun from the base upward as required by Section 22 C (11) of the specifications.

Temporary wood grounds were considered necessary in good practice and were necessary to do a workmanlike job, but no mention was made of them in the specifications.

In subletting the work the prime contractor made no provision for the temporary grounds, and a dispute arose on the job as to what subcontractor was obligated to erect the temporary grounds. The defendants' officers were not a party to the dispute, and confined their ruling to a decision that temporary grounds must be used, and they were used under protest made to the Veterans' Administration.

The Veterans' Administration, in reply to the plaintiff's protest, wrote the plaintiff November 4, 1932, that the mat-

ter of setting temporary grounds was one to be settled between the plaintiff and its subcontractors, and not for the Veterans' Administration to decide.

There was some delay in laying the terrazzo base. In order to hasten the work of the plasterer the defendant's superintendent of construction on the job ordered plastering to proceed notwithstanding the base had not all been laid. To do this temporary wood grounds were necessary for the line between plaster and rounded top of the terrazzo base. On October 10, 1932, the superintendent gave the plaintiff the following order:

> You will proceed to set plaster grounds as called for in Section 24 C, Page 4, Item 19 of the Specifications.
>
> This will be done in order to enable the plasterers to work. The job has been delayed at least one week due to the controversy over the setting of these grounds.

Section 24C (19) of the specifications provided, under the general heading of "Carpentry:"

> Wood grounds shall be provided where shown or required for plastering, for securing all wood trim or other finished woodwork and for securing the work of all trades.

Plastering before the terrazzo base has been installed is bad practice, and not commonly done, due to probable injury and discloration. In good practice the terrazzo base is set before plaster and floor, and gives a ground both for the plaster and the floor level to work to. Where plastering precedes the laying of the terrazzo base, the rubbing of the terrazzo to smooth it down is likely to injure the plaster.

The cost of installing the temporary wood grounds was $2,994.75 and that of removing them was $998.25, a total of $3,993.00, inclusive of overhead and profit. This cost has not been reimbursed the plaintiff.

12. *Sash lifts*, $467.16. The plaintiff withdraws its claim for cost of additional sash lifts.

13. *Repair of plaster cracks,* $497.23. Under the heading of "General Conditions" in the specifications there appears Section No. 34, "*Temporary Heat,*" as follows:

> The contractor shall furnish heat to prevent injury to work or material through dampness or cold. At all times when there is concrete not thoroughly set, and after starting to apply the first coat of plastering, he shall maintain a temperature of at least 40° F. For 10 days previous to the placing of the interior wood finish and during the time that varnish is being applied, a temperature of at least 70° F. shall be maintained in the building.
>
> The temporary heat may be obtained by connecting the radiators for the buildings to the present lines of the heating system at the station at such points as designated by the superintendent. All connections shall be made by the contractor at his own expense but the necessary steam for heat will be furnished by the Government, at no expense to the contractor.
>
> The use of salamanders or other types of heating which may smoke and damage the finished walls, etc., will not be allowed.

The heat for the project came from a power plant maintained by the Government on the premises. This plant was not of sufficient capacity to maintain heat in the Veterans' Home and in the buildings under construction at the same time during extremely cold weather. While plastering was being done in the new buildings the heat therein was suddenly shut off in freezing weather, for humanitarian reasons, to give the existing Veterans' Home adequate heat. The plaster applied and being applied was wet and in that condition froze. The freezing caused the plaster to disintgrate and the defendant's superintendent ordered it patched and replaced, and it was patched and replaced. After the damage was done, defendant's superintendent ordered plastering to be discontinued for the time being.

The plastering subcontractor protested aginst the extra work and was told by the defendant's superintendent to record the cost and submit its claim to the proper officials.

On December 28, 1932, the plaintiff communicated with the contracting officer by letter complaining of this situation and asking relief from damages caused by lack of heat.

May 26, 1933, following a previous proposal, the plaintiff submitted to the Veterans' Administration, a revised proposal for settlement of its claim for repairing the damage to plaster by reason of lack of heat in the amount of $497.23, which was the actual cost plus overhead and profit. This the contracting officer denied June 21, 1933, on the ground that the contract did not provide for payment of an item of this nature. The profit included amounted to $45.20.

14. *Brushing plaster*, $738.30. Due to the lack of heat, as stated in Finding No. 13 herein, considerable areas of the last coat of plaster, the white coat, disintegrated. Defendant's construction superintendent decided that these areas needed resurfacing and ordered the plaintiff to resurface.

The plaintiff did this, under protest, and at a cost of $738.30, including a profit of $67.11. January 13, 1933, and again May 26, 1933, the plaintiff claimed of the contracting officer extra compensation in the approximate amount here sued for, and it has not been paid.

15. *Extra furring*, $13,403.97. The specifications required all pipes to be covered, furred in and plastered.

Paragraph No. 11 (d) (e) of Section 2 C of the specifications under the heading of "Concrete Work and Materials" provided:

> (d) Build into the construction all wall ties, anchors, wood blocks, inserts for support of pipe hangers, etc., hangers for suspended ceilings, nailing strips, grounds, etc., required or as hereinafter specified.
>
> (e) Also build in sleeves for pipe lines as furnished and located by contractor for Heating, Plumbing and Electric Work, etc. Wherever these sleeves or fixtures interfere with beams or girders, etc., the contractor shall provide special slag and beam construction as required to take care of these conditions.

Paragraph No. 2 of Section 22 C of the specifications under the heading of "Lathing and Plastering" provided:

> Except in unfinished rooms, all vertical and horizontal pipes, ducts, etc., for plumbing and heating work not enclosed by masonry or wood furring, shall be concealed by steel furring, metal lath and plaster, unless otherwise shown or directed. Where suspended ceilings are indicated for basements, all heating and water mains shall run exposed under the ceilings.

Under the heading of "General Conditions for Heating" the specifications, paragraph No. 2 of Section 1 H provided:

> Risers shall be run generally concealed in furring or partitions unless indicated otherwise.
>
> Runouts from risers to radiators on upper floors shall be run concealed in furred ceilings below slab unless indicated otherwise.

There were about 500 discrepancies between the mechanical and the architectural drawings, and this number was unusual. A great many horizontal and vertical pipes had to be run in places not shown by the drawings, and the location of their installation was determined by defendant's superintendent of construction from time to time as the work progressed. Pipes had to be run so as to avoid structural members and this often entailed furring not disclosed by the drawings.

Furring shown in the drawings for pipes in the Nurses' Home was not shown in the drawings for corresponding pipes in the other buildings.

The plaintiff furred in all pipes as directed by the defendant's superintendent of construction. The cost of doing so on furring not shown by the drawings amounted to $13,403.97, inclusive of overhead and profit, and it has not been reimbursed to the plaintiff.

16. *Re-laying linoleum,* $204.19. This claim has been abandoned by the plaintiff.

17. *Adjusting windows,* $613.77. In fitting the window sash into their frames the plaintiff allowed the customary

clearance in order that the sash might be moved freely up and down. Thereafter, while plastering was in progress and by reasons thereof moist conditions prevailed in the buildings and the sash swelled and became too tight for operation. In this situation the defendant's superintendent of construction ordered the plaintiff to reduce the width of the sash by shaving or planing, to which the plaintiff objected, on the ground that when the sash became dry again they would be too loose.

The superintendent insisted on their alteration and plaintiff, under protest, made the change. Upon final inspection the sash had become dry, and rattled in their frames. Defendant's officers ordered maple strips to be tacked to the side of the sash to bring the sash back to their proper original width. This was done by the plaintiff at a cost of $613.77, including overhead and profit. The plaintiff filed a claim for this amount with the Comptroller General November 16, 1934, and it has not been paid.

18. *Damages for delay.* Simultaneously with contract No. VAc 110 the defendant entered into a contract December 30, 1931, with the P. H. Meyer Company, of Louisville, Kentucky, covering work by the mechanical trades, such as plumbing, heating, electrical work, outside service connections.

The Meyer contract provided that work should "be commenced promptly after date of receipt of notice to proceed" and "be completed at a date not later than that provided in the contract for General Construction."

The Meyer Company was lacking in diligence in the doing of the work under its contract, as a result of which plaintiff was delayed. The defendant on March 31, 1933, terminated the Meyer Company's right to proceed, and itself took over the doing of the work required by the Meyer contract. After defendant took over this work plaintiff was further delayed by the plumbing, heating and electrical work.

The amount of the delay caused by the Meyer Company and the amount caused by the defendant is not shown, nor does the proof show the damage resulting from the delay by the Meyer Company and by the defendant.

19. The final payment made to the plaintiff on the contract through certification of the General Accounting Office was on or about the latter part of August 1937. By this certification liquidated damages for delay theretofore assessed were remitted and plaintiff was relieved altogether from payment of such damages.

Plaintiff's final voucher against the defendant for the balance of the contract price contained the following indorsement:

> I certify that the above bill is correct and just and that payment therefor has not been received, but this payment is not to be considered final settlement of our contract, and is accepted under protest since certain claims and amounts (as per attached statement) have not been included in this voucher. Standard Accident Insurance Co.

The claims and amounts referred to were as follows (the serial numbers and captions of the findings herein being used for convenient reference):

Finding:

7. *Barrel bolts on window screens,* $387.20.
9. *Access panels,* $535.43.
10. *Membrane waterproofing,* $332.75.
11. *Wood terrazzo grounds,* $3,993.00.
13. *Repair of plaster cracks,* $497.23.
14. *Brushing plaster,* $738.30.
15. *Extra furring,* $13,403.97.
17. *Adjusting windows,* $613.77.
18. (b) *Installing screens,* $968.00.
    (c) *Carpentry and insurance,* $4,203.15.
    (d) *Lathing and plastering,* $16,170.78.
    (f) *Field overhead,* $11,898.02.
    (g) *Temporary radiators,* $3,388.00.
    (i) *Progress photographs,* $166.62.
    (j) *Additional travel,* $3,902.25.
    (k) *General overhead,* $14,141.45.

The last two items are combined as one item, together with another for cost of engineers' reports, now withdrawn by the plaintiff. There are other items in plaintiff's reservation to the final settlement either withdrawn or not involved herein.

20. There is no evidence of appeal to the head of the Veterans' Administration on any item of claim made herein.

None of the work involved herein was covered by an order in writing for changes or an order for extra work.

CONCLUSION OF LAW

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that the plaintiff is entitled to recover $1,123.22.

It is therefore ordered and adjudged that the plaintiff recover of and from the United States the sum of one thousand one hundred twenty-three dollars and twenty-two cents ($1,123.22).

OPINION

WHITAKER, *Judge*, delivered the opinion of the court:

Plaintiff was the surety on the performance bond of the Joseph A. Holpuch Company, which had a contract for the erection of a hospital building and nurses' quarters at the Veterans' Administration Home at Leavenworth, Kansas.

On April 1, 1932, the Holpuch Company's contract was terminated, due to, according to the findings of the contracting officer, its failure to proceed with such diligence as would insure completion of the contract by the agreed date. Thereafter, plaintiff and the Veterans' Administration entered into an arrangement, under which plaintiff agreed to take over performance of the contract and sublet it to Joseph A. Holpuch Company. Pursuant to this agreement, plaintiff and the Holpuch Company entered into a contract on April 25, 1932, whereby the Holpuch Company agreed, as the plaintiff's subcontractor, to perform all work required by the contract. Thereafter, all payments due from the defendant were made to the plaintiff and the plaintiff in turn transmitted them to the Holpuch Company.

In this suit plaintiff sues for certain excess costs incurred for work done which it alleges was not required by the contract, and it also sues for damages for delays caused by an independent contractor who had a contract with defendant for the installation of the plumbing and other mechanical work.

Defendant defends, first, on the ground that whatever excess costs may have been incurred and whatever damages may have been sustained were incurred and sustained by the Holpuch Company and not by plaintiff and, therefore, it says plaintiff cannot recover.

This is not a good defense. When the Holpuch Company's right to proceed was terminated, the surety company, by agreement, was substituted for it as the prime contractor, subject to the obligations of the contract and entitled to all rights and benefits accruing under it. *Fidelity & Casualty Co.* v. *United States*, 81 C. Cls. 495. If excess costs were incurred, they were incurred by plaintiff, so far as the defendant is concerned. This is clearly true in a case where the surety employs another contractor to complete the work. That the same contractor was employed would seem to make no difference.

It may be that the surety undertook to require the Holpuch Company to bear these excess costs, but whether or not it did or whether or not it succeeded, the record does not show. But even if it did, this does not relieve the defendant from liability. Defendant has not paid whatever debt it owes. Its obligation has not been discharged. Whatever may have been paid by the Holpuch Company was not paid for the account of the United States.

The first item of plaintiff's claim is for the cost of changing certain barrel bolts on window screens. On final inspection by the Government's officers plaintiff was required to change them in order to make a more workmanlike job. Plaintiff did so, at a cost of $387.20. We do not need to decide, however, whether or not plaintiff's superintendent of construction was justified in requiring the change, because plaintiff made the change without protesting to the contracting officer against being required to do so. Article 6 of the contract gave the Government "the right to reject

defective material and workmanship or require its correction." If plaintiff thought the job was not defective, it was required by article 15 of the contract to present the matter to the contracting officer for his decision. This article provides:

> * * * all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned. * * *

Plaintiff did not present the matter to the contracting officer and, therefore, is not in position to complain of the requirement of the superintendent of construction.

Plaintiff's next claim is for the cost of installing access panels not required by the plans and specifications. Plaintiff was required by the superintendent of construction to install 61 panels which were not required by the plans and specifications. This was extra work required of plaintiff, but plaintiff cannot recover therefor, in view of article 5 of the contract, which provides:

> * * * no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.

This work was not ordered in writing by the contracting officer. On the contrary, when the superintendent of construction advised the contracting officer that he had ordered the installation of these 61 extra panels the contracting officer ruled that they were not to be installed.

The purpose of article 5 is to protect the Government against the cost of extra work ordered by a subordinate, but not approved by the contracting officer. Had plaintiff waited to secure the ruling of the contracting officer the additional access panels would not have been installed, and plaintiff would not have incurred the additional expense.

Plaintiff's next claim is for $332.75 for membrane waterproofing. The superintendent of construction ruled that

this work was required by the plans and specifications. Plaintiff did the work without presenting the dispute to the contracting officer and, for these reasons stated above, cannot recover.

The next claim is for $3,993.00 for wood terrazzo grounds. These wood grounds were not called for in the specifications, but the superintendent of construction required plaintiff to use them because it was good practice to do so, and because they were necessary to do a workmanlike job.

Some justification for the ruling is to be found in section 24 C (19) of the specifications, under the general heading of "carpentry." This section reads:

> Wood grounds shall be provided where shown or required for plastering, for securing all wood trim or other finished woodwork and for securing the work of all trades. * * *

But the contractor protested to the contracting officer against this ruling of the superintendent of construction and asked for an order in writing on the ground that this was an extra. The contracting officer, however, ruled that the contract required the work to be done, but left to the plaintiff the settlement of the dispute as to which of its subcontractors would be required to do the work. This ruling of the contracting officer as to whether or not these wood grounds were required by the specifications, being a ruling on a question of fact, is final under article 15, *supra*, in the absence of appeal to the head of the department. No appeal was taken and plaintiff, therefore, is bound by the ruling.

Plaintiff's next claim is for the cost of repairing cracks in the plastering, in the amount of $497.23. Under the specifications the contractor was required to maintain in the building a minimum temperature of 40° F. while the plastering was going on. In order to obtain this temporary heat the contractor was permitted to connect the radiators for the buildings to the then existing heating system at the Veterans' Administration Home. It developed, however, that this heating plant was not sufficient to maintain heat in the Veterans' Home and also in the buildings under con-

struction, and while the plastering was being done the defendant shut off the heat in the buildings under construction. As a result the wet plaster froze, causing it to disintegrate. Plaintiff was required to replace it or repair it, which it did, at a cost of $452.03. It presented claim to the contracting officer, but its claim was denied because the contracting officer said, "there is no provision under your contract for the payment of an item of the nature."

The damage to the plastering was clearly the fault of the defendant in failing to furnish the temporary heat which it had agreed to furnish and plaintiff is entitled to recover the damage resulting therefrom.

Plaintiff's claim is in the amount of $497.23, but this includes $41.09 for overhead, and $45.20 for profit. It is entitled to recover only the damage actually suffered, which was the actual cost of repairing or replacing the plaster; it is not entitled to recover profit. Plaintiff is entitled to recover $452.03.

Plaintiff also claims $738.30 for brushing plaster made necessary by the failure of defendant to furnish the necessary heat. Plaintiff is entitled to recover this amount, less the amount included therein for profit, which is $67.11. Plaintiff is entitled to recover on this item the sum of $671.19.

Plaintiff's next claim is in the amount of $13,403.97 for extra furring. The specifications provide that all pipes, ducts, etc., for plumbing and heating work, except in unfinished rooms, should be enclosed by masonry or furring, unless indicated otherwise. It was found, however, that a great many horizontal and vertical pipes had to be run in places not shown by the drawings, due to discrepancies between the mechanical and architectural drawings, of which there were about 500. The location of the pipes was determined by the defendant's superintendent of construction as the work progressed. This required the contractor to do a great deal of furring not called for by the drawings. This was done by plaintiff at the direction of defendant's superintendent of construction. It was an extra made necessary by defendant's defective drawings, but plaintiff is barred from recovery therefor by article 5 of the contract,

quoted above. Before doing this extra work plaintiff was required by the contract to obtain an order in writing. This it did not do.

Plaintiff's next claim is for adjusting windows, $613.77. In fitting the window sash into their frames plaintiff allowed the customary clearance in order that the sash might be moved freely up and down. Thereafter, on account of the moist conditions in the buildings due to plastering, the sash swelled and because too tight for operation. Defendant's superintendent required plaintiff, over its protest, to plane the window sash. After the plastering had dried the windows rattled and defendant's officers required plaintiff to tack maple strips to the windows to bring them back to their proper width. The cost of doing this was $613.77, including overhead and profit. This was extra work made necessary by the fault of the defendant's superintendent of construction in ordering plaintiff to plane the windows in the first place. However, plaintiff is not entitled to recover therefor on account of its failure to secure from the contracting officer an order in writing for this extra work.

Plaintiff's last claim is for damages for delays caused by failure to do promptly the plumbing, heating, electrical work, etc. The P. H. Meyer Company, of Louisville, had an independent contract with defendant for the doing of this work, but its right to proceed under its contract was cancelled on March 31, 1933, and thereafter this work was performed by the defendant itself.

It is admitted the Meyer Company did delay plaintiff, but plaintiff cannot recover from this defendant therefor. It is clearly not entitled to recover from the defendant damages for delays caused by an independent contractor, and not involving any fault on the part of defendant. It was not the defendant that caused these delays; they were caused by a third party.

But the findings of fact of the Director of Construction of the Veterans' Administration, approved by the Assistant Administrator of the Veterans' Administration, show that after the defendant took over this work from the P. H. Meyer Company there was still some delay on the job. For

such delay plaintiff is entitled to recover; but the proof does not show the amount of the delay nor the damages caused thereby. Plaintiff undertook to show its damage for the entire delay caused by the doing of the plumbing, electrical, etc., work, both the delay caused by Meyer Company and the delay caused by the defendant, but it does not separate the two. For failure of proof, no recovery can be allowed on this item.

It results that plaintiff is entitled to recover on the whole case the sum of $1,123.22. Judgment for this amount will be entered. It is so ordered.

MADDEN, *Judge;* and LITTLETON, *Judge,* concur.

WHALEY, *Chief Justice,* dissents.

JONES, *Judge,* took no part in the decision of this case.

A true copy.

Test:

—— ——, Clerk, Court of Claims of the United States.

(7729)